INDEX

	Page
Opinions below	3
Jurisdiction	3
Questions presented	4
Constitutional provisions, statutes and rules involved	5
Statement of case	5
Reasons for granting writ	10
Conclusion	14
Appendix A—Opinions and judgments below	A1-A27
Appendix B—Constitutional provisions, statutes and rules involved	A28-A32

CITATIONS

Cases:	Page
Malloy v. Hogan, 378 U.S. 1	4, 11, 13
Cohen v. Hurley, 366 U.S. 117	4, 9, 10, 11
Schwimmer v. United States, 232 F. 2d 855 (CA8)	12
Tilloston v. Boughner, CA9, No. 15036 (July 13, 1965)	12
Ex parte M. F. Dozier, 262 Ala. 197, 77 So. 2d 903	11
Ex parte Thompson, 228 Ala. 143, 152 So. 229	11
Levy v. Levy, 256 Ala. 629, 59 So. 2d 344	12
Aiello v. Aiello, 272 Ala. 505, 133 So. 2d 18	12
Hilley v. Hilley, 275 Ala. 617, 157 So. 2d 215	12

Constitution provisions and statutes:

United States Constitution:	
Fifth Amendment	4, 11
Fourteenth Amendment	4, 12
Title 28, Section 1257 (3), U. S. Code	3
Title 14, Section 377, Code of Alabama, 1940	11
Title 34, Section 27, Code of Alabama, 1940	12
Title 34, Section 29, Code of Alabama, 1940	12
Title 46, Section 43, Code of Alabama, 1940	11

Rules:

Rule 23 (5), Revised Rules of the Supreme Court of United States	1
Rule 25, Section A, Board of Commissioners of Alabama State Bar	5, 12
Rule 36, Section A, Board of Commissioners of Alabama State Bar	6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

JOHN IKE GRIFFITH and J. ROBERT HUIE,
Petitioners

v.

BOARD OF COMMISSIONERS OF THE
ALABAMA STATE BAR

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, JOHN IKE GRIFFITH, in Case Number Sixth Division, Number 164, Supreme Court of Alabama, and J. ROBERT HUIE, in Case Number Sixth Division, Number 165, Supreme Court of Alabama, joined here pursuant to Rule 23 (5), Revised Rules of the Supreme Court of the United States, effective July 1, 1954,[1] respectively pray that a writ of certiorari be issued out of and under the seal of this Court to review the judgments

---

[1]In this petition, 6 Div. 194, John Ike Griffith, shall be referred to as: R. JIG, p.____, and 6 Div. 195, J. Robert Huie, shall be referred to as: R. JRH, p.____.

and opinions of the Supreme Court of Alabama, entered in the above cases on August 12, 1965, which affirmed judgments and orders by the Honorable J. Edgar Bowron, Presiding Judge, Tenth Judicial Circuit of the State of Alabama as follows:

> "RE: IN THE MATTER OF JOHN IKE GRIFFITH, ATTORNEY AT LAW
>
> 2/10/65: The witness, John Ike Griffith, having been brought into Court by a writ of attachment and having been called as a witness by the Court and having declined and refused to take the stand as a witness for reasons indicated by said witness, the Court adjudges said witness in continuing contempt of Court for failure to take the stand and orders a confinement in the Jefferson County jail until such time as he is willing to conform to the order of the Court and take the stand as a witness. The Court suspends the confinement of said witness and recognizes him on his own bond or bail to permit a review of the order of the Court adjudging him in contempt of Court, providing that said review in whatever manner is proper and legal be promptly processed and forwarded to the reviewing authorities. An exception is noted on behalf of the Commissioner, the Board of Commissioners, and the respondent, or witness, John Ike Griffith."
>
> x x x
>
> "THE COURT: I won't give you all an order, but the order will be identical in each case: Under the circumstances, the witness declining to take the stand as a witness, having been ordered to do so by the Court, the Court will hold the witness, J. Robert Huie, in contempt, continuing contempt, and adjudicate that you are to be confined in the Jefferson County jail until such time as you are willing to conform to the order of the Court and take the stand as a witness. The Court suspends the confinement of said witness and recognizes you on your own bond or bail to permit a review of the order of this Court adjudging you in

contempt of Court, providing that said review in whatever manner is proper and legal be promptly processed and forwarded to the reviewing authorities. As we note an exception to this ruling, separately and severally, to you and your counsel of record, and I, therefore, Mr. Huie, recognize you on your own bond and this case is continued until March 1, 1965, at 2:00 p.m., Room 306, courthouse."

The applications of your petitioners for rehearings were denied by the Supreme Court of Alabama on September 9, 1965 (R. JIG, p. 91; R. JRH, p. 68).

A stay of execution of the foregoing confinement for continuing contempt, as ordered by the Honorable J. Edgar Bowron, was granted in each case by the Supreme Court of Alabama on September 9, 1965 (R. JIG, p. 91; R. JRH, p. 68).

OPINIONS BELOW

The opinions of the Supreme Court of Alabama (JIG Appendix A, *infra,* pp. A1-A13; JRH, Appendix A, *infra,* pp. A14-A23) have been reported at Ex parte *Huie,* 178 So.2d 156 (Ala. 1965) and Ex parte *Griffith,* 178 So.2d 169 (Ala. 1965).

JURISDICTION

The judgments of the Supreme Court of Alabama in these cases (JIG, Appendix A, *infra,* p. A24; JRH, Appendix A, *infra,* p. A25) were entered on August 12, 1965.

Timely petitions for rehearing were denied on September 9, 1965, and stays of execution to permit the filing of this petition granted (JIG, Appendix A, *infra,* p. A26; JRH, Appendix A, *infra,* p. A27).

The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257 (3), and more particularly, as is delineated

in the Statement of the Case, in that *Cohen v. Hurley,* 366 U.S. 117, which was relied upon by the lower court, no longer is expressive of the law concerning attorneys in disbarment proceedings since *Malloy v. Hogan,* 378 U.S. 1, which made the federal standards of Amendment V to the Constitution of the United States applicable to the State of Alabama by the provisions of Amendment XIV to the Constitution of the United States.

QUESTIONS PRESENTED

A.

Is an attorney at law in a disbarment action against him entitled, by refusing to take the witness stand, to invoke the privilege against self-incrimination guaranteed to him by the provisions of Amendment V, Constitution of the United States, as said Amendment is made applicable to the State of Alabama by Amendment XIV, Constitution of the United States?

B.

May an attorney at law in a disbarment action against him refuse to take the witness stand on the basis that to do so would violate his rights and those of his client guaranteed by the due process and equal protection clauses of Amendment XIV, Constitution of the United States?

C.

May an attorney at law, consistent with the due process and equal protection clauses of Amendment XIV, Constitution of the United States, be proceeded against in a disbarment action where the thrust of the complaint against him is a violation or violations of a rule of conduct of the Board of Commissioners of the State Bar, approved by the Supreme Court of Alabama, which said rule is *contra* to the interpreted statutory law of the State of Alabama?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes and rules involved are set forth below (Appendix B, *infra*, pp. A28, *et seq.*)

STATEMENT OF THE CASE

The Grievance Committee of the Alabama Bar Association instituted disbarment proceedings against the petitioner, JOHN IKE GRIFFITH, before the Board of Commissioners of the Alabama State Bar on July 10, 1964 (R. JIG, pp. 32-41); amended the complaint on January 15, 1965 (R. JIG, pp. 43-45); and further amended the complaint also on January 15, 1965 (R. JIG, pp. 46-59).

Similar disbarment proceedings were instituted against petitioner J. ROBERT HUIE on May 20, 1964 (R. JRH, pp. 20-28). Said complaint was amended on January 15, 1965 (R. JRH, pp. 29-32).

The charges against each petitioner complained of violations of two rules of the Board of Commissioners of the Alabama State Bar, *viz:*

> *RULE 25, SECTION A, as last amended.*
>
> 25. No person heretofore or hereafter admitted to practice law in Alabama shall (a) knowingly or willfully make any false representations of fact to any judge, court or jury to induce a favorable action or ruling by either;
>
> (b) File or prosecute or aid in the filing or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of

the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false.

RULE 36, SECTION A, as last amended.

36. No person licensed to practice law in the courts of the State of Alabama shall be guilty of any conduct unbecoming an attorney at law.

The gravamen of the complaints against each petitioner was that he:

"***served as referring or forwarding attorney for the complainant wherein the bill of complaint represented (to a court in Alabama) that either the complainant or respondent was a bona fide resident of the State of Alabama, when, in truth and in fact, the said attorney knew or had reasonable cause to believe that in one or more, if not all, of said cases, neither the complainant nor the respondent was a bona fide resident of the State of Alabama." (R. JIG, p. 33; R. JRH, p. 21).

Thereupon, on January 25, 1965, the president of the Board of Commissioners filed with the secretary of said Board an order for a commissioner to take the testimony of each petitioner (R. JIG, p. 60; R. JRH, p. 39).

The secretary of the Board of Commissioners then issued a *subpoena duces tecum* to each petitioner on January 26, 1965 (R. JIG, pp. 61-62; R. JRH, pp. 40-41). The thrust of said *subpoenas* was that each petitioner produce everything of a record nature pertaining to the list of divorce cases which was attached as an exhibit to the complaints (R. JIG, p. 61; R. JRH, p. 40).

Thereupon, Lawrence K. Andrews, General Counsel, Alabama State Bar, on January 26, 1965, caused a Notice to Take Depositions to be served on each petitioner (R. JIG, p. 6; R. JRH, p. 5).

Petitioners then filed Motion to Quash Service of Notice to Take Deposition (R. JIG, pp. 63-64; R. JRH, pp. 44-45). Two of the grounds stated were:

> "7. In that the defendant, JOHN IKE GRIFFITH, (J. ROBERT HUIE) is not a witness in this case, but a defendant.
>
> ***
>
> 9. In that the notice and attempt to take oral deposition of the defendant violates his constitutional rights under the Due Process Clause of the Constitution of the State of Alabama and the Constitution of the United States of America."

Each petitioner also filed a Motion to Quash Service of Subpoena Duces Tecum (R. JIG, pp. 65-66; R. JRH, pp. 42-43), wherein it was stated petitioners were not witnesses but defendants.

On February 9, 1965, attorney for petitioner, JOHN IKE GRIFFITH, appeared before the commissioner appointed and said commissioner overruled the aforesaid Motion to Quash Service of Notice to take Deposition and Motion to Quash Service of Subpoena Duces Tecum (R. JIG, p. 7).

On February 10, 1965, the identical procedure ensued in the case of petitioner J. ROBERT HUIE (R. JRH, p. 6).

In each case attorney for petitioners declined on behalf of each for them to appear and further declined on behalf of each for them to give any testimony.

Instanter warrants for each petitioner issued (R. JIG, p. 9; R. JRH, p. 8).[2]

Proceedings before the Honorable J. Edgar Bowron, Presiding Judge of the Circuit Court of Jefferson County, Alabama (Tenth Judicial Circuit) in the matter of petitioner JOHN IKE GRIFFITH were had on February 9, 1965 (R. JIG, pp. 10-24). A Motion to Quash Attachment was filed (R. JIG, pp. 11-13). Among other grounds were the following:

> "3. That in this matter before the Commissioner, the accused attorney is charged with violating Rule 25 (a) and Rule 36 in that in one or more divorces, that the accused attorney knew or had reasonable grounds to know that neither complainant or respondent in those cases was a bona fide resident citizen of the State of Alabama. That further, by virtue of Title 34, Section 29, of the Code of Alabama of 1958, no prescribed period of time is required for a complainant to become a resident. That in these proceedings the accused attorney is being called upon to give certain information in regard to these divorces in which it might be that such testimony might incriminate his own client. That by virtue of Title 46, Section 43, of the Code of Alabama of 1958, as recompiled, it is affirmatively stated in Paragraph 4 in regard to the duty of an attorney that he is to maintain inviolate the confidence and at every peril to themselves preserve the secrets of their clients. That further, by virtue of Title 46, Section 50, of the Code of Alabama of 1958, as recompiled, it is stated that an Attorney may be removed or suspended by the Circuit Court for a willful violation of any of the provisions of Section 43. This puts your accused attorney in the position where he is on both horns of a dilemma and that on the other hand it is his duty in accord with the written mandate of

[2]The record in the J. ROBERT HUIE case shows an *instanter* issuing prior to the date of the request by the commissioner. However, further proceedings show a proper *instanter* warrant for attachment issued, or no point was made of this.

the state law that at every peril to himself to preserve the secrets of his clients.

4. That this Honorable Court is without jurisdiction in this matter in that this Honorable Court is usurping the power and authority of another tribunal and that your defendant is being denied his rights under Article 6, Declaration of Rights, Due Process Clause, of the Constitution of the State of Alabama and the Constitution of the United States of America."

Ground Number 3 was discussed by counsel and court (R. JIG, pp. 16-17).

As to Ground Number 4, *Cohen v. Hurley*, 366 U.S. 117, was advocated by counsel for the Board of Bar Commissioners as negating the contention of petitioner he did not have to appear as a witness (R. JIG, p. 19).

The court itself relied on *Cohen* (R. JIG, pp. 22-23) to overrule the motion to quash.

On February 10, 1965, further proceedings were held before the Honorable J. Edgar Bowron (R. JIG, pp. 24-30). It was stated petitioner JOHN IKE GRIFFITH had refused to take the witness stand before the commissioner (R. JIG, p. 25).

Counsel for petitioner then assigned all grounds previously assigned in objecting to petitioner taking the witness stand (R. JIG, p. 26).

Petitioner declined to the court to take the witness stand to be examined (R. JIG, pp. 28-29) on advice of counsel, for reasons heretofore mentioned.

The Honorable J. Edgar Bowron proceeded to hold petitioner in continuing contempt of court for failure to take the stand as a witness (R. JIG, pp. 29-30).

The case of petitioner J. ROBERT HUIE was for all practical and legal purposes identical. A Motion to Quash Attachment was filed (R. JRH, pp. 10-12).

Counsel for petitioner specifically stated "this defendant is being denied the right of due process of law under Article One, Section Six of the Constitution of the State of Alabama, and under the Due Process Clause of the Constitution of the United States". (R. JRH, p. 15)

The witness, J. ROBERT HUIE, declined to take the witness stand on the same grounds as stated in JOHN IKE GRIFFITH's case (R. JRH, p. 16), and the same continuing order of contempt was adjudged (R. JRH, p. 16).

Petitioners filed identical petitions in the Supreme Court of Alabama for Writ of Mandamus or other appropriate writ (R. JIG, pp. 1-4; R. JRH, pp. 1-4).

Certiorari to perfect the record in each case did issue (R. JIG, p. 31-A; R. JRH, p. 18), and return made (R. JIG, pp. 32-69; R. JRH, pp. 19-48).

Both cases were submitted on petition, return to certiorari and on briefs (R. JIG, p. 70; R. JRH, p. 49). There were no assignments of error. The judgments of contempt below were affirmed (JIG, Appendix A, *infra,* p. A24; JRH, Appendix A, *infra,* p. A25)

Timely applications for rehearing were made on August 26, 1965 (R. JIG, p. 89; R. JRH, p. 66), and denied on September 9, 1965 (JIG, Appendix A, *infra,* p. A26; JRH, Appendix A, *infra,* p. A27). Rehearings being denied, petitions for stay of execution (R. JIG, p. 90; JRH, p. 67) pending filing of this petition for writ of certiorari were granted (JIG, Appendix A, *infra,* p. A26; JRH, Appendix A, *infra,* p. A27).

REASONS FOR GRANTING THE WRIT

Mr. Justice Black, dissenting in *Cohen v. Hurley,* 366 U.S. 117, posed the question: "***Could the Court per-

emptorily confine a lawyer in jail for contempt until he agreed to co-operate with the court by foregoing his privilege against self-incrimination—or renouncing his freedom of speech? ***" 366 U.S. 143.

The present petition for writ of certiorari squarely presents the factual situation of the question.

It would appear that *Cohen* held less stringent standards than the federal ones against self-incrimination applied to the states. Since *Malloy v. Hogan,* 378 U.S. 1, the federal standards of Amendment V, Constitution of the United States, have applied to the individual states.

Malloy had been ordered to testify before a referee appointed by a court in Connecticut to conduct an inquiry into alleged gambling and other criminal activities. Petitioners here were defendants, Ex parte *M. F. Dozier,* 262 Ala. 197, 77 So. 2d 903, in a highly judicial proceeding Ex parte *Thompson,* 228 Ala. 113, 152 So. 229.

Repeatedly, as noted, petitioners refused to take the witness stand against themselves on state or federal constitutional grounds. To confine them in jail until they did answer questions would violate the philosophy of *Malloy* and relegate attorneys to the category of "second-class citizens" to whom constitutional safeguards are not available.

If it be a fact as alleged in the complaints against petitioners that parties to the divorces concerned were not bona fide residents of Alabama and petitioners knew of this fact, then they would each be subject to prosecution for subornation of perjury, Title 14, Section 377, Code of Alabama, 1940 (Appendix B, p. A29), and client would be subject to prosecution for perjury.

Secondly, to have petitioners violate the attorney-client confidential relationship, Title 46, Section 43, Code of

Alabama 1940 (Appendix B, p. A30) by answering questions is a clear violation of their rights and the rights of client under the due process and equal protection clauses of Amendment XIV, Constitution of the United States. *Schwimmer v. United States,* 232 F. 2d 855 (CA8); *Tillotson v. Boughner,* CA9, No. 15036 (July 13, 1965).

Thirdly, Title 34, Section 27, Code of Alabama, 1940, as amended (Appendix B, *infra,* p. A29) and Title 34, Section 29, Code of Alabama, 1940, as amended (Appendix B, *infra,* p. A30) have been interpreted by the Supreme Court of Alabama in *Levy v. Levy,* 256 Ala. 629, 59 So. 2d 344 and *Hilley v. Hilley,* 275 Ala. 617, 157 So. 2d 215 as to require no particular or specific period of residence in the State of Alabama of a complainant in a divorce proceeding where the respondent is a non-resident when the court has jurisdiction of both parties to the cause of action, the only jurisdictional requirement being that the complainant be domiciled in the state so as to confer upon the court jurisdiction of the *res.* Hence, the Supreme Court of Alabama has refused to set aside a divorce decree where one of the parties thereto objected. *Aiello v. Aiello,* 272 Ala. 505, 133 So. 2d 18. The decrees of divorce are not void. Rule 25 of the Board of Commissioners of the Alabama State Bar (Appendix B, *infra,* p. A31) is, therefore, causing conduct of an attorney in procuring divorces, unless he be able to probe the mental processes of his client and ascertain his true intention as to future permanent residence in the State of Alabama, to be denominated unethical and subjecting himself to disbarment, although the divorce decree obtained be valid for all intents and purposes under the pertinent statutes. Petitioners submit this clearly violates their rights guaranteed by the due process and equal protection clauses of Amendment XIV, Constitution of the United States.

The matter seems to be so clear since *Malloy* that the constitutional rights of petitioners have been violated it is suggested this Court could summarily reverse the orders and judgments below on its authority.

CONCLUSION

For reasons stated, it is respectfully submitted the petition for writ of certiorari in these cases should be granted.

Respectfully submitted,

Fred Blanton, Jr., Esq.
Suite 1627,
Twenty-one Twenty-one Building
Birmingham, Alabama 35203

Counsel for Petitioners

APPENDIX A

I

6 Div. 194

Ex parte John Ike Griffith, Attorney at Law
(Re: John Ike Griffith
v.
J. Edgar Bowron, Circuit Judge,
10th Judicial Circuit of Alabama)

Petition for Writ of Certiorari

HARWOOD, JUSTICE

On 10 July 1964, the Grievance Committee of the Alabama Bar Association filed charges against John Ike Griffith, a member of the Bar of this state. These charges allege unprofessional conduct against Griffith because of his activity and participation in obtaining a number of so-called "quickie" divorces in several courts of this state. A list of such cases were filed as an exhibit to the charges.

On 15 January 1965, the original charges and exhibits were amended to include some 41 such divorce cases in Winston County Circuit Court (Haleyville Division) and 269 such divorce cases in Marion County Circuit Court.

Upon filing of a complaint (in this instance by the Grievance Committee of the Alabama State Bar) Rule B (12) of the Rules Governing the Conduct of Attorneys in Alabama, provides that the President shall make and cause to be filed with the Secretary an order fixing a date for the taking of evidence upon the complaint. It is further provided that the evidence may be taken by a Commissioner designated by the President.

On 25 January 1965, Frank J. Tipler, Jr., as President of the Board of Commissioners of the Alabama State Bar,

appointed Timothy M. Conway as Commissioner to take testimony upon the charges and specifications, the appointment providing that said Commissioner should take the testimony of John Ike Griffith at the courthouse in Birmingham on 9 February 1965, at 10:00 A. M.

Notice of such hearing was served upon Griffith, and included in the notice was a subpoena duces tecum to Griffith to bring with him and produce:

> "(1) All records in his possession pertaining to divorces obtained by him as forwarding attorney, or as solicitor, in the Law and Equity Court of Winston County, Double Springs, Alabama; (2) All files, records and correspondence in said cases; (3) All agreements in writing between complainants and respondents in said cases; (4) All checks and receipts representing payments of costs and/or attorney fees in said cases; (5) All records of fees received or forwarded in said cases; (6) All records of every nature or description pertaining to the divorce cases set forth on Exhibit A, as amended, and Exhibit C of the Complaint in the above styled matter; and (7) the office copy of a letter under date of July 3, 1963, to Mr. James A. Meceli, 370 Parsippany Boulevard, Boonton, New Jersey."

The notice and subpoena duces tecum was signed by John B. Scott, Secretary of the Alabama State Bar. (See *Rules Governing the Conduct of Attorneys in Alabama,* Sec. B (19); Title 46, Secs. 35, Code of Alabama 1940.)

On 5 February 1965, Hon. Matt H. Murphy, Jr., as attorney for John Ike Griffith, filed with the Secretary of the Alabama State Bar a motion to quash service of the motion to take the deposition and a motion to quash the service of the subpoena duces tecum.

On the day set for the hearing Mr. Murphy appeared before Mr. Conway, the Commissioner, and again offered

the motions to quash as above mentioned. Mr. Griffith was not present on advice of Mr. Murphy. Upon the motions being overruled, Mr. Murphy declined to permit his client to appear before the Commissioner.

Thereupon Mr. Conway, the Commissioner, petitioned the Hon. J. Edgar Bowron, Presiding Judge of the Tenth Judicial Circuit, for an order of attachment for the said Griffith, commanding him to appear instanter before the Commissioner and give testimony. Judge Bowron issued the attachment as prayed.

Service of the attachment was accepted, and the hearing before the Commissioner was resumed. Mr. Griffith was sworn, but again refused to take the stand as a witness. Several grounds were asserted as a basis of Mr. Griffith's action, among which it was asserted that should he testify there could possibly arise a breach of the attorney-client privilege on Mr. Griffith's part.

The matter was then again presented to Judge Bowron. Again a hearing and argument was had before Judge Bowron. Mr. Griffith was ordered by Judge Bowron to take the stand and again he refused, the record in this respect showing:

> " * * * I respectfully decline to take the stand, and for the reason cite Title 46, Section 43, paragraph 4, wherein the Code of Alabama binds my hands to maintain inviolate the secrets of my clients, and that the charges that have been preferred against me by the Board are obvious and clear that the testimony desired to be adduced from the witness, or from myself, would violate the confidences and secrets of my clients, and for that reason I decline to take the stand and testify, and for the further reason that Title 46, Section 50, paragraph three, wherein it states that should I violate the secrets and the confidences of my client that I may be disbarred for doing so, and for

the further reason that I have studied the charges against me, and I have consulted legal counsel and I have been advised by legal counsel that I am not required to take the stand and advised not to take the stand, and that I respectfully obey the counsel of my own lawyer in that respect, and I further cite as grounds for my refusal to take the stand the contents or the substance of Title 46, Section 35, and Title 46, Section 50, and, Your Honor, I beg to be excused from taking the stand.

"THE COURT: Before you sit down, Mr. Griffith, you fully understand that you, as an attorney, are an officer of the Court?

"MR. GRIFFITH: Yes; Your Honor.

"THE COURT: And, regardless of that relationship, having been ordered and requested by the Court to take the stand, you refuse on the basis of the statement which you have just made?

"MR. GRIFFITH: That is right; Your Honor.

"THE COURT: You may be seated sir. All right. The Court will now hold the witness, Mr. John Ike Griffith, in contempt of Court, and will order him into confinement until such time as he will conform to the order and direction of the Court to take the stand as a witness. I am entirely agreeable to suspending the confinement of this witness to offer counsel an opportunity to review the ruling of this Court, provided that it is done with reasonable expedition and promptness."

The court thereupon entered a formal order adjudging Mr. Griffith in continuing contempt for failure to take the stand and ordered his confinement until such time as he is willing to conform to the order of the court. Sentence was suspended, and Mr. Griffith was released on his own recognizance until the order could be reviewed by this court.

At the threshold of our review, we are met with petitioner-appellant's argument that the proceedings before Commissioner Conway are null and void in that neither Mr. Conway, nor the members of the Board of Commissioners of the Alabama State Bar, nor the members of the Grievance Committee had taken the oath of office required by the provisions of Article 16, Section 279 of the Constitution of Alabama of 1901.

Section 279, supra, provides in pertinent part:

> "All members of the legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices, shall take the following oath or affirmation:
>
> " 'I, _____, solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God.' "

The above provision applies only to state officers. *State ex rel. Wilkinson et al. v. Lane,* 181 Ala. 646, 62 So. 31. Members of the bar of Alabama are members of a private incorporated association. There is no statutory provision requiring any separate oath on their part before entering upon their duties as members of the bar of this state. They are not state officers. Every attorney practicing before the courts of this state is an officer of the court.

Further, by the provisions of Section 39, Title 46, Code of Alabama 1940, every attorney at law, before being permitted to practice, shall take the following oath:

> "I do solemnly swear (or affirm) that I will demean myself as an attorney, according to the best of my

learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person's cause for lucre or malice, and that I will support the constitution of the State of Alabama and of the United States, so long as I continue a citizen thereof, so help me God."

This oath is in all material aspects the same as the oath required of state officers by Section 279 of our Constitution. This in itself would negative appellant's contention, even if, for the sake of argument, attorneys should be regarded as state officers, a status that cannot be logically accepted.

There is therefore no merit in this contention.

Counsel for appellant also argues that he had filed his motions to quash the complaint with Mr. Scott, Secretary of the Alabama State Bar, and this action placed the matter in the hands of Commissioners of the Alabama State Bar, and that a ruling by a quorum of the Commissioners was necessary for a proper ruling on the motions.

This argument overlooks that part of Section 33, Title 46, Code of Alabama 1940, providing that the Board of Commissioners of the Alabama State Bar may designate any person to take testimony under oath in any investigation of charges against an attorney, and further overlooks the provisions of Rule B (12) that evidence may be taken by a Commissioner designated by the President of the Commissioners of the State Bar.

These provisions do not contemplate that a quorum of the Commissioners of the State Bar shall be convened every time a ruling is invoked before the Commissioner designated by the President to hear the evidence in a disciplinary action against a member of the State Bar.

At the taking of testimony before a Commissioner appointed for that purpose, it is not necessary that any ob-

jection be made to any testimony, but the Board of Commissioners shall consider only such evidence as is in its opinion relevant, material, or competent. Rule B(18). Further, at any meeting of the Board of Commissioners to consider the evidence theretofore taken, the Board shall hear all parties in interest and their counsel. This of course gives the accused attorney full opportunity to present arguments and question the validity of any ruling by the Commissioner to a quorum of the Commissioners of the State Bar.

The above provisions demonstrate that the argument of the petitioner in the aspect above mentioned is untenable.

Petitioner argues that he was a defendant in the proceedings instituted by the State Bar and that Commissioner Conway had no power or legal warrant to have him subpoenaed as a "witness." Counsel relies upon the statement to be found in *Lewis v. Gerald, et al.*, 236 Ala. 91, 181 So. 306, to the effect that:

> "An attorney whose conduct is under investigation by the Grievance Committee is not compelled to appear before such committee, but when he does so his appearance must be deemed and treated as voluntary."

The investigation by a grievance committee is analogous to an investigation by a grand jury. It is but a preliminary inquisition. *Lewis v. Gerald,* supra.

But we are not here concerned with the petitioner's appearance before a grievance committee, but with his appearance before a Commissioner duly appointed by the President of the Board of Commissioners of the State Bar to take evidence on charges theretofore preferred by a grievance committee.

Section 35, Title 46, Code of Alabama 1940, provides:

> "In the investigation of charges of misconduct, the Board, and any committee appointed by it for this

purpose, shall have power to summon and examine witnesses under oath and compel their attendance and the production of books, papers, documents and other writings necessary or material to the inquiry."

Also, Rule B (19) of the Rules provides that:

"Witnesses may be summoned by the Board, its President, its Secretary, any grievance committee, or by the Commissioner, their appearance and testimony required, the oath administered, depositions taken, and the production of books, papers and other documents required in all respects as required by law."

Clear authority therefore existed to subpoena the petitioner before Commissioner Conway, unless, as petitioner contends, he could not be compelled to appear as a "witness," he claiming to be a defendant.

Hearings before the Board of Commissioners of the Alabama State Bar, or a commissioner duly appointed to conduct such hearing, is, strictly speaking, neither a civil nor a criminal one. Its sole purpose is to purge the bar of a member, whose conduct has, since his admission, rendered him unfit to remain a member of the bar. *Ex parte Thompson,* 228 Ala. 113, 152 So. 229; *Ex parte Messer,* 228 Ala. 16, 152 So. 244.

As stated in *Messer,* supra:

"It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to quasi criminal proceedings; that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument. *Smith v. State,* 13 Ala. App. 411, 69 So. 406; *Miller v. State,* 110 Ala. 69, 20 So. 392; *Attorney General v. Pelletier,* 240 Mass. 264, 134 N. E. 407."

The petitioner could therefore be lawfully subpoenaed and compelled to testify before Commissioner Conway.

Counsel for petitioner argues that in the proceedings before Judge Bowron the petitioner was on "both horns of a dilemma" in that should he take the stand and testify he would possibly be confronted with violating Section 43 (4), Title 46, Code of Alabama 1940, imposing on him the duty of maintaining inviolate and at every peril, the secrets of his client, and on the other hand, upon his refusal to testify he would be subject to disbarment for violating Section 50 of Title 46, Code of Alabama 1940, for a wilful disobedience or violation of an order of a court requiring him to do or forbear an act connected with, or in the course of, his profession.

Whether a communication by a client to his attorney is privileged is a question of fact to be determined by the court. A witness, be he an attorney or a client, is not entitled to decide the question for himself. Thornton on *Attorneys at Law,* Vol. 1, Section 96, and authorities therein cited.

There are limitations on the application of the rule of privileged communications. As pointed out in *Sawyer v. Stanley,* 241 Ala. 39, 1 So. 2d 21, the perpetration of a fraud is outside the scope of professional duty of an attorney, and that the great majority of cases hold that the privilege "protecting communications between attorney and client is lost if the relation is abused, as where the client seeks advice that will serve him in the commission of a fraud." The reason for this exception to the general rule is that if a client discloses his fraudulent purpose, and the attorney refuses to be connected with it, there cannot be said to be professional employment, and consequently no privilege accrues; if the client does not disclose his fraudulent purpose, there is no confidential relationship

established, and no attaching privilege; if an attorney knowing the facts and fraudulent purpose agrees to aid in the perpetration of the fraud, he then becomes a party to it, and the communications made to him cease to be privileged. *Thornton,* supra, Sec. 122; *58 Am. Jur., Witnesses,* Sec. 517.

Where false allegations are made in pleadings in order to invoke the jurisdiction of a court, and false testimony is presented to support the untrue allegations, monumental fraud is thereby perpetrated upon the court. The relation of attorney and client cannot be used as a cloak to cover wrongdoing. The rule of privilege is defensive, not offensive. If the communication between attorney and client relates to unlawful or fraudulent accomplishment, higher public policy, and the duty of an attorney to society as a whole abrogates the privilege.

Further, communications made by a client to an attorney which the attorney in the discharge of his duty is of necessity obliged to make public are not privileged. See *White v. State,* 86 Ala. 69, 5 So. 674. This rule is applicable to facts communicated by a client which are to be alleged in pleading. *Thornton,* supra, Sec. 118; *58 Am. Jur. Witnesses,* Sec. 491.

In addition to the above doctrines it was specifically held in *White v. State,* supra, that an attorney may, without violating the rule of confidential communications, be compelled to testify to the fact of his employment; that he was the authorized attorney of a client in a certain transaction; as to any matter manifestly not intended to be private or confidential, but was intended to be communicated to the adverse party; to prove the handwriting of his client, the payment of monies to him; the execution of papers which the attorney attested.

It is therefore manifest that the petitioner in refusing to take the stand and testify assumed for himself the right

to determine whether his assertion of the doctrine of confidential communications was valid. This was a matter solely within the province of the court to determine. The petitioner's actions in the premises were premature, and can furnish no justification for his refusal to testify.

Finally, petitioner argues that he is guilty only of a criminal contempt, and that the court's action in committing him to jail until he took the stand as a witness was excessive in view of Section 126, Title 13, Code of Alabama 1940, which limits the punishment for criminal contempt to a fine not exceeding fifty dollars and imprisonment not exceeding five days.

The petitioner cites *Ex parte Bullen,* 236 Ala. 56, 181 So. 498 in support of his argument under this proposition. In *Bullen* the contemnor had been sentenced to one hour in jail for contempt because of his refusal to answer a question as to whom he had voted for in a municipal election after being ordered to do so by the court.

The court apparently proceeded only under the theory of criminal contempt, as was its province. This is not to say that the court could not have proceeded against Bullen's conduct as a civil contempt and have compelled obedience to its orders. However, this question was not involved in the Bullen appeal, but solely the question of his criminal contempt.

In *United States v. United Mine Workers of America,* 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884, two fines were levied in the contempt proceedings for the same act. The fine levied for past contumacy was held to be for criminal contempt, and the fine to coerce the union into future compliance with the court's order was held to be for civil contempt. As stated by the court: "The same acts may justify a court in resorting to coercive and to punitive measures."

In the present case the lower court saw fit to proceed against the petitioner-contemnor in a civil contempt aspect only.

Our cases make clear the distinction between a criminal contempt and a civil contempt. Our cases hold that statutory limitations on punishment for contempt (Sections 9, 126, and 143 of Title 13, Code of 1940) apply only to criminal contempt, and not to civil contempt. *Ex parte King,* 263 Ala. 487, 83 So. 2d 241; *Ex parte Dickens,* 162 Ala. 272, 50 So. 218.

In *Ex parte Dickens,* 162 Ala. 272, 50 So. 220, it is stated:

> "A 'civil contempt' consists in failing to do something, ordered to be done by a court in a civil action, for the benefit of the opposing party therein."

In *Ex parte Hill,* 229 Ala. 501, 158 So. 531, this court wrote:

> "It is also said that the limitations provided by statute were not intended to restrict the power of the court to enforce its orders and decrees. That right is called a proceeding to declare a civil contempt. A criminal contempt is one in which the purpose of the proceeding is to impose punishment for disobedience to the orders of the court. A civil contempt invokes the power of the court to commit one who is continuing to violate its orders until he complies with them. This court has held that the statutory limitations do not apply to civil contempts as thus defined. Ex parte Dickens, supra; Ex parte Stickney, 40 Ala. 160."

As stated in *17 Am. Jur. 2d Contempt,* Section 4:

> "A criminal contempt involves no element of personal injury. It is directed against the power and

> dignity of the court; private parties have little, if any, interest in the proceedings for punishment. Conversely, if the contempt consists in the refusal of a person to do an act that the court has ordered him to do for the benefit or advantage of a party to a suit or action pending before the court, and the contemnor is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court; the party in whose favor that judgment was rendered is the real party in interest in the proceedings. Civil contempt proceedings look only to the future. And it is said that in civil contempt proceedings, the contemnor must be in a position to purge himself."

In the present case the primary purpose of the court's order holding the petitioner in contempt until he took the stand and testified was for the advantage of the party injured by his refusal, i.e., the Commissioners of the Alabama State Bar. The court's order was coercive, and provided in effect that petitioner could purge himself by complying with the court's order to testify. Clearly the contempt was a direct and continuing contempt and the court was fully and legally warranted in treating petitioner's action as a civil contempt and ordering him confined until he complied with the order of the court.

AFFIRMED.

Lawson and Goodwyn, J. J., concur. Coleman, J., concurs in result.

II

6 Div. 195

Ex parte J. Robert Huie, Attorney at Law
(In Re: J. Robert Huie
v.
J. Edgar Bowron, Circuit Judge
10th Judicial Circuit of Alabama)

Petition for Writ of Certiorari

COLEMAN, JUSTICE.

Petitioner seeks review of an order of the circuit court holding petitioner in contempt because petitioner failed and refused to take the stand as a witness in a disbarment proceeding brought against petitioner by the "Grievance Committee of the Alabama State Bar Association."

The court ordered that petitioner be confined in jail until such time as he is "willing to conform to the order of the Court and take the stand as a witness." The court suspended the confinement and released petitioner on his own recognizance pending review.

We granted certiorari and the clerk has certified the record to us. It discloses that the Grievance Committee filed with the Board of Commissioners of the Alabama State Bar charges that petitioner has violated Rules 25 and 36 of Section A of the "Rules Governing the Conduct of All Persons admitted to the Practice of Law in the State of Alabama," which rules recite as follows:

25

"No person heretofore or hereafter admitted to practice law in Alabama shall

"(a) Knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

"(b) file or prosecute or aid in the filing or prosecution of any suit, cross bill, or proceeding seeking a divorce in a court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

"(c) while acting as attorney for either party in any suit for divorce in any court in Alabama represent to the court or conspire with any party, attorney, or person to represent to the court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false." (272 Ala. XXI)

36

"No person licensed to practice law in the courts of the State of Alabama shall be guilty of any conduct unbecoming an attorney at law." (239 Ala. XXV)

See: 242 Ala. XV.

The specifications are that petitioner violated said rules in certain divorce cases by making representations as to the residence of a party or parties to the suit.

The President of the Board of Commissioners appointed an examining commissioner to take testimony and ordered him to take the testimony of petitioner at a specified time and place. Notice of the hearing and subpoena duces tecum were served on petitioner. At the appointed time, petitioner refused to take the stand. The examining commissioner obtained attachment for petitioner from the circuit court, and, after hearing, the court made the order holding petitioner in contempt, which order we now review.

Petitioner filed before the Board of Commissioners motions to quash the notice and subpoena duces tecum.

Petitioner argues that the court erred in holding him in contempt for five reasons which we discuss, not, however, in the order in which they are presented in brief.

First, petitioner argues that ". . . . by virtue of Title 46, Section 35, that only the board, and any committee appointed by it shall have power to summons and examine witnesses . . . .," that petitioner is a defendant, not a witness, and that neither the Grievance Committee nor a commissioner has power to compel attendance and have petitioner's testimony taken by a commissioner; citing *Lewis v. Gerald,* 236 Ala. 91, 181 So. 306.

§ 33, Title 46, Code 1940, provides that the board of commissioners shall establish rules governing procedure in cases of alleged misconduct of attorneys. The board has done this. Rule 12, of Section B, recites:

> "12. *President's Order Fixing Date, and by Whom Testimony Taken*
>
> "The evidence may be taken either (a) by the Grievance Committee of the Board, or (b) by a Commissioner designated by the President, or (c) by the Board, and the President shall determine whether the evidence shall be taken by the Grievance Committee of the Board or by a Commissioner or by the Board. The President shall thereupon make and cause to be filed with the Secretary an order fixing a date for taking the evidence upon the said complaint." (239 Ala. XXVII)

A copy of the President's order appointing the examining commissioner appears in the record and fixes the date for taking testimony of petitioner.

§ 35, Title 46, recites that "the board, and any committee appointed by it for this purpose shall have power to summon and examine witnesses under oath and compel their attendance and the production of books . . . .," etc.,

and that "Such summons or subpoena shall be issued under the hand of the secretary of the board or the chairman of any duly constituted sub-committee of the board, and shall have the force of a subpoena issued by a court of competent jurisdiction . . . ."

Rule 19, of Section B, recites:

> "19. *Summoning Witnesses: Production of Papers*
>
> "Witnesses may be summoned by the Board, its President, its Secretary, any Grievance Committee, any Chairman of a Grievance Committee, or by the Commissioner, their appearance and testimony required, the oath administered, depositions taken, and the production of books, papers and other documents required in all respects as provided by law." (239 Ala. XXVIII)

Two papers were served on petitioner. One paper is entitled: "NOTICE TO TAKE DEPOSITIONS" and is signed by counsel for the Alabama State Bar. It has not been pointed out to us where rule or statute provides that counsel may issue a subpoena, and, indeed, the notice does not expressly command petitioner to attend the hearing. It may well be that petitioner could not be held in contempt if this notice were the only process served on him.

The subpoena duces tecum is under the hand of:

> "S/John B. Scott
>
> Secretary, Alabama State Bar"

We think common knowledge justifies us in taking notice that this is the hand of the secretary of the board of commissioners. § 24, Title 46, Code 1940. To comply with the letter of § 35, Title 46, the description should be: Secretary of the Board of Commissioners of the Alabama State Bar.

This paper commands the sheriff to summon petitioner to appear before the commissioner and there to testify.

It seems to us that the examining commissioner was appointed and the day set as required by Rule 12 of Section B, and that subpoena was issued as provided by § 35, Title 46, and Rule 19. We hold that the commissioner had authority to take testimony and that the process served on petitioner was sufficient to satisfy the statute and rule.

Authority of the examining commissioner and proper service of sufficient process being shown, it follows that the court did not err in holding petitioner in contempt for the reason that the examining commissioner did not have lawful power to compel petitioner's attendance and to take his testimony.

Petitioner relies on the following statement:

> "We may say further that an attorney, whose conduct is under investigation by the Grievance Committee is not compelled to appear before such committee, but when he does so his appearance must be deemed and treated as voluntary." *Lewis v. Gerald,* supra, at page 94.

In *Lewis v. Gerald,* supra, the court held that an attorney, who had been investigated by the Grievance Committee, was not entitled to read and inspect the evidence which that committee had acquired relating to charges of unprofessional conduct on the part of the attorney. Whatever may be the force of the statement from *Lewis v. Gerald* quoted above, the statement does not apply to the instant case because the instant petitioner has not been summoned to appear before the Grievance Committee. He was summoned to appear before an examining commissioner who was appointed by the president of, and who is taking testimony for, the Board of Commissioners.

Petitioner's first reason to show error is not well taken.

Second, petitioner argues that neither the examining commissioner nor the Board of Commissioners of the State Bar are qualified to act against petitioner because they have not been sworn as all officers are required, by Section 279 of the Constitution of 1901, to be sworn.

Section 279 applies only to state officers. *State ex rel. Wilkinson v. Lane,* 181 Ala. 646, 62 So. 31. We do not think that either the examining commissioner or the Board of Commissioners are state officers in the constitutional sense, and, therefore, are of opinion that Section 279 has no application. These commissioners are officers of the State Bar, which is an association of attorneys. The members of the association are not state officers.

> "The attorney does not hold an office or public trust in the constitutional or statutory sense of that term, but is an officer of the court exercising a privilege or franchise. In a sense he is an officer of the State with an obligation to the public no less significant than his obligation to his clients. It is an office held during good behavior and is one of which he can be divested only upon good cause shown and after proper judicial proceedings. See *Ex Parte* Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; Boston Bar Assn. v. Casey, 211 Mass. 187, 97 N. E. Rep. 751, 39 L. R. A. (N.S.) 116; *Ex Parte Faulkner,* 1 W. Va. 269; 6 C. J. 568, and authorities cited." *In Re W. Marvin Clifton,* 115 Fla. 168, 173, 155 So. 324.

We think it follows that the examining commissioner and the Board of Commissioners are not state officers, in the constitutional sense, and that § 279 does not apply to them.

Petitioner asserts that, because he had filed with the Board of Commissioners a motion to quash the service of the notice and subpoena duces tecum, the matter was in

the hands of the Commissioners and "a quorum of the Commissioners was necessary before there could be a proper ruling as set out in Title 46, Section 33 of the Code of Alabama of 1940."

As already noted, § 33, Title 46, provides that the Board of Commissioners shall establish rules of procedure in cases involving professional misconduct and the Board has established such rules. We do not find in § 33 any requirement that a quorum of the Board must act on a motion to quash before a commissioner appointed according to the rules can take testimony, and, therefore, we are of opinion that action by the Board on the motion was not a condition precedent to the action taken by the circuit court in the order now under review.

We hold petitioner's second reason not well taken.

Third, petitioner asserts that under § 126, Subdivision 4, of Title 13, the circuit court does not have jurisdiction to impose "a direct and continuing contempt of court against an accused attorney who merely declines to appear before the Grievance committee of the Alabama State Bar prior to trial. Ex parte Bullen, 236 Ala. 56, 181 So. 498."

Petitioner misconceives the nature of the proceeding, in which he has been summoned to testify, in supposing that he is being summoned before the Grievance Committee prior to trial. He is on trial and is summoned as a witness before the examining commissioner appointed by the President of the Board of Commissioners.

§ 126 (4) provides that the circuit court has authority to punish contempts by fines, not exceeding fifty dollars, and by imprisonment not exceeding five days. In *Bullen*, petitioner had been sentenced to serve one hour in jail for contempt for refusing to answer a question. This court said he was guilty of a direct contempt and subject to punishment by fine or imprisonment, or both.

From the citations, we understand petitioner's argument to be that, in the case at bar, if petitioner actually be in contempt, the court could have punished petitioner by a fine, not exceeding fifty dollars, or imprisonment, not exceeding five days, or both, but that the court could not order petitioner to be confined until he is willing to take the stand as a witness.

We think petitioner is in error because of § 35, Title 46, and § 455, Title 7. § 35, Title 46, provides in part:

> ". . . . Such summons or subpoena . . . . shall have the force of a subpoena issued by a court of competent jurisdiction, and any witness or other person . . . . who shall refuse to be sworn or testify . . . . shall be liable to attachment upon application . . . . to any judge of any court of record for the district where the investigation is conducted as in cases of contempt."

§ 455 of Title 7 recites:

> "Any witness refusing to testify, unless privileged by law from testifying in the cause, must be committed to the jail of the county, there to remain without bail until he consents to testify."

See *Ex parte Morris*, 252 Ala. 551, 42 So. 2d 17.

In as much as the subpoena duces tecum here has the force of a subpoena issued by a court of "competent jurisdiction," and refusal of a duly subpoenaed witness to testify subjects him to confinement unless he is privileged from testifying, and petitioner was duly subpoenaed and has refused to testify, he is subject to confinement, unless privileged by law from testifying in the cause.

Petitioner's third reason does not show error.

Petitioner's fourth and fifth reasons go to the question of privilege. Petitioner argues that he cannot be required

to testify because § 43, Title 46, commands him to preserve the secrets of his clients, and because ". . . . The accused attorney beyond per adventure of a doubt is being called upon in this sort of case to take the stand and give testimony, which would involve a mental operation of his own client and that as a matter of state law, he is actually faced with a disbarible (sic) offense if he should reveal any of the secrets of his clients . . . ."

Petitioner has not taken the stand and no question has been propounded to him. To say now whether he will be privileged to refuse to answer any question would be sheer speculation. The possibility that a question might call for privileged evidence does not justify petitioner in refusing to take the stand.

In reply brief, petitioner appears also to contend that he is being called to give evidence against himself in violation of Section 6 of Constitution of 1901.

In a criminal case, the prosecution cannot call defendant as a witness against his will. If the proceeding against petitioner were a criminal case, the prosecution could not call petitioner as a witness, against his will, because he is the defendant. We do not think, however, that the proceeding in which he is called to testify is a criminal case. This court, in a disbarment proceeding, has said:

> "This is not a criminal prosecution within the influence of section 6 of the Constitution, but is only quasi criminal. State v. Quarles, 158 Ala. 54, 48 So. 499; Thomas v. State ex rel. Stepney, 58 Ala. 365. Therefore, Buckley's case does not support the contention.
>
> "It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to *quasi criminal proceedings*; that the defendant may be compelled to testify as a witness for

the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument. Smith v. State, 13 Ala. App. 411, 69 So. 406; Miller v. State, 110 Ala. 69, 20 So. 392; Attorney General v. Pelletier, 240 Mass. 264, 134 N. E. 407." *Ex parte Messer*, 228 Ala. 16, 18, 152 So. 244.

Because the proceeding, in which petitioner is called to testify, is not a criminal case, we hold that the fact that he is the defendant is not a good ground entitling him to refuse to take the witness stand.

We do not say that he may be compelled to answer a question when his answer to the question would incriminate him. No question has been asked, and here again we will not speculate. In this connection, see: *Cohen v. Hurley*, 366 U. S. 117, 81 S. C.t 954, 6 L. Ed. 2d 156; *In re Cohen*, 9 App. Div. 2d 436, 195 N.Y.S. 2d 990; *Matter of Cohen*, 7 N. Y. 2d 488, 199 N.Y.S. 2d 658, 166 N. E. 2d 672.

Error not being shown, the judgment is due to be affirmed.

AFFIRMED.

Lawson, Goodwyn, and Harwood, JJ., concur.

III

THE SUPREME COURT OF ALABAMA
THURSDAY, AUGUST 12, 1965
THE COURT MET IN SPECIAL SESSION
PURSUANT TO ADJOURNMENT
PRESENT: ALL THE JUSTICES

6th Div. 194

Ex parte: John Ike Griffith, Attorney at Law

Petition for Writ of Certiorari

(Re: John Ike Griffith v. J. Edgar Bowron, Circuit Judge, Tenth Judicial Circuit of Alabama)

Comes the petitioner, by attorney, and the Petition for Writ of Certiorari to the Circuit Court of Jefferson County, Alabama in the contempt proceeding against John Ike Griffith, in which judgment was entered by said Court on February 10, 1965, being submitted on briefs and duly examined and understood by the Court,

IT IS ORDERED AND ADJUDGED that the judgment of the Circuit Court rendered in said cause, on said date, be and is hereby affirmed.

IT IS FURTHER ORDERED that the costs be taxed against the Petitioner, for which costs let execution issue.

IV

THE SUPREME COURT OF ALABAMA
THURSDAY, AUGUST 12, 1965
THE COURT MET IN SPECIAL SESSION
PURSUANT TO ADJOURNMENT
PRESENT: ALL THE JUSTICES

6th Div. 195

Ex parte: J. Robert Huie, an Attorney at Law

Petition for Writ of Certiorari

(Re: J. Robert Huie v. J. Edgar Bowron, Circuit Judge, Tenth Judicial Circuit of Alabama)

Comes the petitioner, by attorney and the Petition for Writ of Certiorari to the Circuit Court of Jefferson County, Alabama in the contempt proceeding against J. Robert Huie, in which judgment was entered by said Court on February 10, 1965, being submitted on briefs and duly examined and understood by the Court,

IT IS ORDERED AND ADJUDGED that the judgment of the Circuit Court rendered in said cause, on said date, be and is hereby affirmed.

IT IS FURTHER ORDERED that the costs be taxed against the Petitioner, for which costs let execution issue.

V

THE SUPREME COURT OF ALABAMA
THURSDAY, SEPTEMBER 9, 1965
THE COURT MET IN SPECIAL SESSION
PURSUANT TO ADJOURNMENT
PRESENT: ALL THE JUSTICES

6th Div. 194

Ex parte: John Ike Griffith, Attorney at Law

Petition for Writ of Certiorari to Jefferson Circuit Court

(Re: John Ike Griffith v. J. Edgar Bowron, Judge of the Tenth Judicial Circuit)

IT IS ORDERED that the application for rehearing filed on August 26, 1965, be and the same is hereby overruled.

The Petitioner, in the above cause, having filed his Petition for Stay of Execution, pending review by the Supreme Court of the United States, and said petition being duly examined and understood by the Court, it is hereby

ORDERED, ADJUDGED AND DECREED that a Stay of Execution is granted until this case is disposed of by the Supreme Court of the United States, provided petition for certiorari is filed in the Supreme Court of the United States within 45 days from this date. If the petition for certiorari is not filed within the 45 day period, this stay will be null and void.

VI

THE SUPREME COURT OF ALABAMA
THURSDAY, SEPTEMBER 9, 1965
THE COURT MET IN SPECIAL SESSION
PURSUANT TO ADJOURNMENT
PRESENT: ALL THE JUSTICES

6th Div. 195

Ex parte: J. Robert Huie, Attorney at Law

Petition for Writ of Certiorari to Jefferson Circuit Court

(Re: J. Robert Huie v. J. Edgar Bowron, Judge of the Tenth Judicial Circuit)

IT IS ORDERED that the application for rehearing filed on August 26, 1965, be and the same is hereby overruled.

The Petitioner, in the above cause, having filed his Petition for Stay of Execution, pending review by the Supreme Court of the United States, and said petition being duly examined and understood by the Court, it is hereby

ORDERED, ADJUDGED AND DECREED that a Stay of Execution is granted until this case is disposed of by the Supreme Court of the United States, provided petition for certiorari is filed in the Supreme Court of the United States within 45 days from this date. If the petition for certiorari is not filed within the 45 day period, this stay will be null and void.

APPENDIX B

Constitution, Statutes and Rules Involved

I

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II

Constitution of the United States, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III

Title 28, Section 1257(3), United States Code.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or

where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

IV

Title 14, Section 377, Code of Alabama, 1940

Perjury and subornation in other cases.

Any person who wilfully and corruptly swears or affirms falsely, or corruptly procures another to so swear or affirm, in regard to any material matter or thing, upon any oath or affirmation authorized by law, except on the trial of any person under an indictment for a felony, shall, on conviction, be imprisoned in the penitentiary for not less than two or more than five years.

V

Title 34, Section 27, Code of Alabama, 1940

For abandonment, twelve months' residence to be proved.

No bill can be filed for a divorce on the ground of voluntary adandonment, unless the party applying therefor, whether husband or wife, has been a bona fide resident citizen of this state for twelve months next preceding the filing of the bill which must be alleged in the bill and proved; provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action.

VI

Title 34, Section 29, Code of Alabama, 1940

If defendant a nonresident, a year's residence by plaintiff must be proved.

When the defendant is a nonresident, the other party to the marirage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action.

VII

Title 46, Section 43, Code of Alabama, 1940

Duties of attorneys. It is the duty of attorneys:

1. To support the constitution and laws of this state, and of the United States.

2. To maintain the respect due to courts of justice and judicial officers.

3. To employ for the purpose of maintaining the causes confided to them such means only as are consistent with truth, and never seek to mislead the judges by any artifice, or false statement of the law.

4. To maintain inviolate the confidence and at every peril to themselves to preserve the secrets of their clients.

5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party, or a witness, unless required by the justice of the cause with which they are charged.

6. To encourage neither the commencement nor continuance of any action or proceeding from any motive of passion or interest.

7. Never to reject for any consideration personal to themselves the cause of the defenseless or oppressed.

VIII

Rules Supreme Court United States. Rule 23 (5)

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

IX

RULE 25, SECTION A, as last amended.

Board of Commissioners of Alabama State Bar

25. No person heretofore or hereafter admitted to practice law in Alabama shall

(a) knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

(b) File or prosecute or aid in the filing or prosecution of any suit, cross bill, or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court or conspire with any party, attorney, or person to represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false.

X

RULE 36, SECTION A, as last amended.

Board of Commissioners of Alabama State Bar

36. No person licensed to practice law in the courts of the State of Alabama shall be guilty of any conduct unbecoming an attorney at law.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 2 2 1965
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 688

JOHN IKE GRIFFITH and J. ROBERT HUIE,
Petitioners

v.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent

BRIEF OF RESPONDENT

M. Ronald Nachman, Jr.
1109-1125 First National Bank Building
Montgomery, Alabama 36104
Special Counsel for
Respondent

William H. Morrow, Jr.
Alabama State Bar
Post Office Box 2106
Montgomery, Alabama 36103
Acting General Counsel for
Respondent

INDEX

	Page
Jurisdiction	2
Questions Presented	2-3
Statutes and Rules Involved	4-5
Statement of the Case	5
Argument	18
Question A	18
Question B	21
Question C	28
Question D	31
Question E	32
Conclusion	34

CASES CITED

Page

In re Bailey, 248 P. 29, 30 Ariz. 407 (Ariz. 1926) 24

Brophy v. Industrial Accident Commission, 115 P. 2d 835, 46 C.A. 2d 278 (Cal. App. 1941) 23

Brown v. Walker, 161 U. S. 591 27

Cohen v. Hurley, 366 U. S. 117 ..... 2, 25, 28

Delaware, T. & W. Ry. v. Koske, 279 U. S. 7 32

A. B. Dick v. Marr, 957 F. Supp. 83 31

Emspak v. United States, 349 U. S. 190 20

Fish v. State Bar of California, 4 P. 2d 937, 214 C. 215 (Cal. 1931) 23

Hillery v. Hillery, 275 Ala. 617, 157 So. 2d 217 33

Hoffman v. U. S., 341 U. S. 479, 95 L. Ed 1118, 71 S. Ct. 814 26

Johnson v. State Bar of California, 52 P. 2d 928, 4 C. 2d 744 (Cal. 1935) 23

Landy v. United States, 283 F. 2d 303 25

Levy v. Levy, 256 Ala. 629, 59 So. 2d 344 33

Malloy v. Hogan, 378 U. S. 1 ..... 2, 25, 27, 28

Mason v. U. S., 244 U. S. 362 26

McIntosh v. State Bar of California, 274 P. 1067, 211 Cal. 261 (Cal. 1922) 23

Ex parte Messer, 228 Ala. 16, 152 So. 244 (Ala. 1933) 23

New York Dock Co. v. The Pozman, 274 U. S. 117 32

People's Bank of Buffalo v. Brown, 112 F 652 (C C A. 3) 30

Quinn v. United States, 349 U. S. 155 19

Randall v. Brigham, 74 U. S. 523 24

Rogers v. United States, 340 U. S. 367 27

Ex parte Thompson, 228 Ala. 113, 152 So. 229 (Ala. 1933) 23

United States v. Monia, 317 U. S. 424 20
United States v. Vajtauer, 273 U. S. 103 ..... 20, 22, 28
In re Vaughn, 209 P. 353, 189 Cal. 491 (Cal. 1922) 23
Ex parte Wall, 107 U. S. 265 24
Re Willie, Fed. Cas. No. 14692e 26

Constitutional provisions, statutes and rules:

United States Constitution:

Fifth Amendment 2
Fourteenth Amendment 2, 3, 28, 30, 32

Title 34, Section 29, Code of Alabama, 1940 33

Title 46, Section 35, Code of Alabama, 1940 5

Title 46, Section 43, Code of Alabama, 1940 16

Title 46, Section 50, Code of Alabama, 1940 14

Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama

Rule 12, Section B 4, 10
Rule 19, Section B 4, 10
Rule 25, Section A 5, 31, 33
Rule 36, Section A 5

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

NO.
688

JOHN IKE GRIFFITH and J. ROBERT HUIE,
Petitioners

v.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent

BRIEF OF RESPONDENT

INTRODUCTION

This Brief of Respondent is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The Petitioners, John Ike Griffith and J. Robert Huie, duly licensed as attorneys at law by the Supreme Court of Alabama, in disciplinary proceedings brought against them by The Alabama State Bar, thwarted the efforts of the General counsel of The Alabama State Bar to propound any questions to them by refusing to take the stand. The Honorable J. Edgar Bowron, Presiding Judge, Tenth Judicial Circuit of the State of Alabama, adjudged the Petitioners in continuing contempt of court and ordered their confinement until willing to take the stand. (R. JIG, pp. 29-30; R. JRH, p. 16)[1] The Supreme Court

[1]The Respondent will adopt the symbol references used by the Petitioners, namely, 6 Div. 194, John Ike Griffith, as R. JIG, p._____, and 6 Div. 195, J. Robert Huie, as R. JRH, p._____ Appropriate page references will be made to the Appendix to the Petition for Writ of Certiorari.

of Alabama affirmed these judgments and orders in Case Number Sixth Division, Number 164, as to the Petitioner, **John Ike Griffith,** and in Case Number Sixth Division, Number 165, as to the Petitioner, **J. Robert Huie.** (JIG, Appendix, pp. A1-A13; JRH, Appendix, pp. A14-A23).

JURISDICTION

The Petitioners seek to invoke jurisdiction under 28 U.S. Code, Sec. 1257(3), and cite two cases, **Cohen v. Hurley,** 366 U.S. 117, and **Malloy v. Hogan,** 378 U. S. 1. The Petitioners attempt to read into **Malloy v. Hogan,** supra, a holding that is not contained therein, namely, that an attorney subject to disciplinary proceedings may prevent the propounding of any questions to him by refusing to take the stand upon the grounds that some unidentified question which might be asked would possibly tend to incriminate him. As will be hereinafter demonstrated, the Respondent respectfully submits that **Malloy v. Hogan,** supra, is subject to no such interpretation.

QUESTIONS PRESENTED

The Petitioners have presented three questions. The Respondent submits that the questions presented are more clearly stated as follows:

QUESTION A. Where a witness has failed to claim any constitutional privilege against self-incrimination before the courts of a state will certiorari lie where he asserts such privilege for the first time in his Petition for Writ of Certiorari?

QUESTION B. Does the privilege against self-incrimination of Amendment V, Constitution of the United States, as said Amendment is made applicable to the State of Alabama by Amendment XIV, Constitution of the United States, permit an attorney subject to disciplinary proceedings to refuse to take the stand and thus prevent

the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would tend to incriminate him, or must such privilege be exercised in connection with specific questions propounded?

QUESTION C. Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, permit an accused attorney in disbarment proceedings to refuse to take the witness stand and thus prevent the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would relate to confidential communications between attorney and client, or must such privilege be exercised in connection with specific questions propounded?

QUESTION D. Where an attorney subject to disciplinary proceedings by a state bar association fails to challenge before the courts of Alabama the constitutionality of the Rules Governing the Conduct of Attorneys pursuant to which proceedings were had against him, will certiorari lie where he attacks the constitutionality of such Rules for the first time in his Petition for Writ of Certiorari?

QUESTION E. Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, preclude disciplinary procedures against an attorney pursuant to Rules Governing the Conduct of Attorneys promulgated by a Board of Commissioners and approved by the Supreme Court of Alabama, which Rules prohibit an attorney from filing an action for divorce with knowledge or reasonable cause to believe that neither party is a bona fide resident of the State where the statutes and decisions construing said statutes require that one party to a divorce proceeding must be a bona fide resident of the state although the statute prescribes no specific period of time to establish residence?

STATUTES AND RULES INVOLVED

In addition to the constitutional provisions, statutes and rules set forth in the Appendix to the Petition for Writ of Certiorari, the Respondent calls the following to the attention of the Court:

I

Amended Rules Governing Conduct of Attorneys in Alabama, Rule B(12):

> PRESIDENT'S ORDER FIXING DATE, AND BY WHOM TESTIMONY TAKEN The evidence may be taken either (a) by the Grievance Committee of the Board, or (b) by a Commissioner designated by the President, or (c) by the Board, and the President shall determine whether the evidence shall be taken by the Grievance Committee of the Board or by a Commissioner or by the Board. The President shall thereupon make and cause to be filed with the Secretary an order fixing a date for taking the evidence upon the said complaint.

II

Amended Rules Governing Conduct of Attorneys in Alabama, Rule B(19):

> SUMMONING WITNESSES: PRODUCTION OF PAPERS Witnesses may be summoned by the Board, its President, its Secretary, any Grievance Committee, any Chairman of a Grievance Committee, or by the Commissioner, their appearance and testimony required, the oath administered, depositions taken, and the production of books, papers and other documents required in all respects as provided by law.

III

Title 46, Section 35, Code of Alabama, 1940:

> POWER OF SUBPOENA — In the investigation of charges of professional misconduct, the board, and any committee appointed by it for this purpose shall have power to summon and examine witnesses under oath and compel their attendance and the production of books, papers, documents and other writings necessary or material to the inquiry. Such summons or subpoena shall be issued under the hand of the secretary of the board or the chairman of any duly constituted sub-committee of the board, and shall have the force of a subpoena issued by a court of competent jurisdiction, and any witness or other person who shall refuse to be sworn or testify or produce books, papers, documents or other writings demanded shall be liable to attachment upon application to the supreme court of the state or to any judge of any court of record for the district where the investigation is conducted as in cases of contempt.

STATEMENT OF THE CASE

The Statement of the Case contained in the Petition for Writ of Certiorari sets forth accurately and chronologically the general nature of the pleadings filed and the hearings conducted in these proceedings, but omits certain details which the Respondent deems pertinent.

The charges filed by the Grievance Committee of The Alabama State Bar against the Petitioner, John Ike Griffith, on July 10, 1965 (R. JIG, pp. 32-41); as amended on January 15, 1965 (R. JIG, pp. 43-45); and as further amended on January 15, 1965 (R. JIG, pp. 46-59) allege that said attorney was guilty of violating or failing to comply with Rule 25 of Section A and Rule 36 of Section A of

the Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama. (Appendix B, pp. A31-A32). This attorney was charged with acting as referring or forwarding attorney in obtaining approximately 325 divorces. Flagrant violation of the Rules was charged in the following language:

> ". . . the said Attorney, while serving as referring or forwarding attorney, did, in association with one Neil Metcalf, submit to the Inferior Court of Geneva County, Alabama, approximately fifteen divorce cases. . . . and in said cases served as referring or forwarding attorney for the complainant where in the bill of complaint represented to the Inferior Court of Geneva County, Alabama, that either the complainant or respondent was a bona fide resident of the State of Alabama, when, in truth and in fact, the said Attorney knew or had reasonable cause to believe that in one or more, if not all, of said cases, neither the complainant nor the respondent was a bona fide resident of the State of Alabama."

> " . . . (b) That the said Attorney maintained an office in Birmingham, Jefferson County, Alabama, a short distance from the Circuit Court of said County, whose Equity Docket in divorce matters has been current from October 24, 1961, to the date of the filing of this complaint, whereas, the Inferior Court of Geneva County, Alabama, is located approximately 240 miles from the office maintained by the Said Attorney. Moreover, the Circuit Court of Jefferson County, Alabama, has maintained a strict vigilance in answer and waiver divorce matters, whereas the Inferior Court of Geneva County, Alabama, became known throughout the State of Alabama, prior to and during the time specified in this complaint as a haven of rest for those who were not bona fide residents of

the State of Alabama, to obtain a divorce by an allegation that they were residents of Alabama for such length of time as required by law, coupled with an answer and waiver.

That from September 1, 1962, through August 31, 1963, the Circuit Court of Geneva County, Alabama, granted ten divorces.

That from October 24, 1961, to August 1, 1962, the Inferior Court of Geneva County, Alabama, granted 3080 divorces on bill of complaint and answer and waiver. These cases were reported to the Bureau of Vital Statistics of the State of Alabama as required by law. Much publicity was given to the fact and it became common knowledge not only among the members of the Bar but the public as well, that the Inferior Court of Geneva County, Alabama, was operating what is commonly called a 'quickie divorce mill'. On July 16, 1962, the Bar of Alabama issued a warning to the Judge of said Court and some of the four attorneys who appeared personally before the Court, that Rule 25A, as last amended, was being flagrantly violated.

Thereafter, from August 1, 1962, to September, 1963, the Inferior Court of Geneva County, Alabama, granted 2,740 divorces on bill of complaint and answer, and virtually none of these cases were reported to the Bureau of Vital Statistics of the State of Alabama, as required by law.

These divorce cases granted during the period aforesaid were hidden from the public view, locked in an office disconnected with that of the Register of the Court, where no one was employed.

On the 1st day of August, 1962, a special docketing system was created for the only four lawyers per-

sonally appearing before and obtaining divorces in said Court, as follows:

The B Docket, the C Docket and the D Docket.

B-100 through B-749, representing 650 divorce cases submitted during said period by Boswell and Smith, of Geneva, Alabama; C-100 through C-1352, representing 1253 divorce cases submitted during said period by Neil Metcalf, of Geneva, Alabama;

D-100 through D-849, representing 750 divorce cases submitted during said period by Ned Moore, of Opp, Alabama. During this time the Register of the Inferior Court of Geneva County, Alabama, maintained a docket "A", open to the public, but none of the B, C and D cases were reflected thereon, and a complete search of the Register's Office would not reveal any of the B, C and D docketed cases. As a result of this system the public, the press and the Grievance Committee of the Alabama Bar, notwithstanding investigation, was kept completely in the dark as to the activities of said Court.

Despite all this, the said Attorney, in association with Neil Metcalf, did obtain approximately fifteen divorces in said Court throughout the entire period of time specified in this complaint, and in order to hide his identity and participation in said cases did not sign the pleadings. This number of divorces obtained by the said Attorney exceeded the number of divorces granted by the Circuit Court of Geneva County, Alabama, from September 1, 1962, through August 31, 1963, viz: ten divorces . . . ."

". . . serving as referring or forwarding Attorney for the complainant, obtained approximately Forty-One divorces in the Law and Equity Court of Winston

County, Alabama, Haleyville Division, all answer and waiver, as set forth on Exhibit "A" (attached hereto and made a part hereof with leave of reference thereto for all purposes) under the circumstances, hereinafter set forth in (b), and that said Attorney knew or had reasonable cause to believe that in one or more, if not all, of said cases that neither the complainant nor the respondent in said cases was a bona fide resident of the State of Alabama as represented in said cases to the Law and Equity Court of Winston County, Alabama, Haleyville Division. (b) That said Attorney maintained an office in Birmingham, Jefferson County, Alabama, a short distance from the Circuit Court of said County, whose Equity Docket in divorce matters has been current from October 24, 1961, to the date of the filing of this Complaint, whereas the Law and Equity Court of Winston County, Haleyville Division, is located approximately 90 miles from the office maintained by said Attorney. Moreover, the Circuit Court of Jefferson County, Alabama, has maintained a strict vigilance in answer and waiver divorce matters, whereas the Law and Equity Court of Winston County, Haleyville Division, became known, prior to and during the time specified in this Complaint, as a haven of rest for those who were not bona fide residents of the state of Alabama, to obtain a divorce by an allegation that they were residents of Alabama for such length of time as required by law (or a similar allegation), coupled with an answer and waiver.

In an effort to conceal his identity and his participation in said cases he did not sign the pleadings but the same were submitted pro se without stating the address of the pro se party complainant. . . ."

". . . the said attorney did submit to the Circuit Court of Marion County, approximately 269 divorce cases,

and in said cases, served as attorney for the complainant wherein the Bill of Complaint represented to said Courts that either the complainant or respondent was a bona fide resident of the State of Alabama, when in truth and in fact, said attorney knew or had reasonable cause to believe that in one or more, if not all of said cases, that neither the complainant nor respondent was a bona fide resident of the State of Alabama. . . ."

The charges filed by the Grievance Committee of the Alabama State Bar against the Petitioner, **J. Robert Huie**, on May 20, 1965 (R. JRH, pp. 20-28); as amended on January 15, 1965 (R. JRH, pp. 29-32) contain allegations substantially identical to the above quoted language, avering that this attorney served as referring or forwarding attorney in submitting 76 divorce cases to the Inferior Court of Geneva County, Alabama, and 11 divorce cases to the Circuit Court of Marion County, Alabama, wherein the bill of complaint represented to the Court that either the complainant or respondent was a bona fide resident of the State of Alabama, when, in truth and in fact, he knew or had reasonable cause to believe that neither the complainant nor the respondent was a bona fide resident of the State of Alabama.

Pursuant to Rule B (12) of the Rules Governing the Conduct of Attorneys in Alabama, the President of The Alabama State Bar caused to be filed with the Secretary on January 25, 1965, his Orders appointing a Commissioner to take the testimony of each Petitioner. Orders provided for the taking of the testimony of **John Ike Griffith** on February 9, 1965, at 10:00 A.M. (R. JIG, p. 60), and that of **J. Robert Huie** on February 10, 1965 (R. JRH, p. 39), both hearings to be held at the Courthouse, Birmingham, Alabama.

Pursuant to Rule B (19) of the Rules Governing the Conduct of Attorneys in Alabama, the Secretary of the

Board of Commissioners issued a subpoena duces tecum to each Petitioner, commanding the production at the time and place appointed for the taking of his testimony, of certain books, records and correspondence pertaining to the numerous divorces which each had obtained. (R. JIG, pp. 61-62; R. JRH, pp. 40-41).

The General Counsel of The Alabama State Bar caused each Petitioner to be served with a Notice to Take Deposition advising of the taking of his deposition at the time and place designated. (R. JIG, p. 6; R. JRH, p. 5)

Each Petitioner filed a Motion to Quash Service of Notice to Take Deposition (R. JIG, pp. 63-64; R. JRH, pp. 44-45) and a Motion to Quash Service of Subpoena Duces Tecum. (R. JIG, pp. 65-66; JRH, pp. 42-43)

On February 9, 1965, at 10:00 A.M. in the Jefferson County Courthouse, Birmingham, Alabama, Hon. Timothy M. Conway, the Commissioner appointed to take the testimony of Petitioner, John Ike Griffith, convened the hearing for this purpose. Hon. Matt H. Murphy, Jr., attorney for the Petitioner, appeared on his behalf and after argument of counsel, the Commissioner overruled the above described Motion to Quash Service of Notice to Take Deposition and Motion to Quash Service of Subpoena Duces Tecum. (R. JIG, p. 7). The attorney then declined on his behalf for the Petitioner to appear and declined on his behalf for him to give any testimony.

On February 10, 1965, identical proceedings were followed in the case of the Petitioner, J. Robert Huie. (R. JRH, p. 6)

Warrants were issued for each of the Petitioners (R. JIG, p. 9; R. JRH, p. 8) and on February 9, 1965, certain proceedings were had before the Honorable J.

Edgar Bowron, Presiding Judge of the Circuit Court of Jefferson County, Alabama, (Tenth Judicial Circuit) in the Matter of Petitioner, John Ike Griffith. (R. JIG, pp. 10-24). This Petitioner filed a Motion to Quash Attachment. (R. JIG, pp. 11-13). The Petition for Writ of Certiorari sets forth verbatim paragraphs 3 and 4 of this Motion to Quash Attachment. (Petition for Writ of Certiorari, pp. 8-9). In substance, paragraph 4 of said Motion asserts that by testifying the Petitioner "might incriminate his own client", and that as an attorney, he has a duty "to maintain inviolate the confidence and preserve the secrets of his client". Paragraph 4 contains a general allegation that the Petitioner is being denied his rights under the due process clause of the Constitution of the United States of America. It should be noted that the Motion to Quash Attachment is devoid of any general or specific reference to the Petitioners' rights against self-incrimination.

In response to the argument that the Petitioner by testifying might be required to divulge confidential information imparted to him by his client, the Court observed:

> "THE COURT: I think now maybe you are making argument on behalf of objections to questions which you anticipate may be asked:
>
> MR. MURPHY: I am trying to make a motion, Your Honor.
>
> THE COURT: I realize that that can come in at this stage, as far as the motion to quash and it can come in again when the question is asked of the witness." (R. JIG, p. 16)

At the conclusion of argument the Court overruled the Motion to Quash Attachment. (R. JIG, p. 22)

On February 10, 1965, the Petitioner, John Ike Griffith, again appeared before the Honorable J. Edgar Bowron, together with his attorney, Matt H. Murphy, Jr., at which time Timothy M. Conway, the Commissioner appointed to take Petitioner's testimony, informed the court of his continued refusal to take the witness stand, (R. JIG, p. 25) the Commissioner stating to the court:

> "MR. CONWAY: . . . as a part of his objection, he was taking the position that the interrogation would invade the attorney-client privilege. It was my opinion that the objections with respect to that point were premature, and that such objections would necessarily have to be made at the time the questions were asked which tend to invade the attorney-client privilege, . . ."

Argument was again heard, Petitioner's counsel and the court stating:

> "MR. MURPHY: . . . Now, under these charges—actually they are charges which involve charges under Rule 25 (a) in which the sole question is the residence or non-residence of complainants or respondents in divorce actions, and we say that in this case the client is so closely connected with the defendant that it is like two balls and chains being tied together, and that if this accused attorney takes the stand, or should he say anything in regard to a mental operation wherein they have been in and have left, and he should have knowledge of such a thing, it would certainly betray the secrets of his client—
>
> THE COURT: Excuse me for interrupting, but aren't you speculating on questions that are going to be asked?
>
> MR. MURPHY: Yes, sir. And on those grounds we respectfully say, with no disrespect to the Court—

THE COURT: I understand.

MR. MURPHY: We say that he declines to take the stand. . . ." (R. JIG, p. 27)

The Court ordered the Petitioner to take the witness stand and he again refused, stating his reason therefor as reflected in the following excerpt from the record:

"MR. GRIFFITH: Your Honor, may it please the Court, I express my respect to this Honorable Court, and express my respect to the Alabama Bar Association and the Board of Commissioners, and out of no manner of defiance or to violate their rules and regulations, but I respectfully decline to take the stand, and for the reason cite Title 46, Section 43, paragraph 4, wherein the Code of Alabama binds my hands to maintain inviolate the secrets of my clients, and that the charges that have been preferred against me by the Board are obvious and clear that the testimony desired to be adduced from the witness or from myself, would violate the confidences of my clients, and for that reason I decline to take the stand and testify, and for the further reason that Title 46, Section 50, paragraph three, wherein it states that should I violate the secrets and the confidences of my client that I may be disbarred for doing so, and for the further reason that I have studied the charges against me, and I have consulted legal counsel and I have been advised by legal counsel that I am not required to take the stand and advised not to take the stand, and that I respectfully obey the counsel of my own lawyer in that respect, and I further cite as grounds for my refusal to take the stand the contents or the substance of Title 46, Section 35, and Title 46, Section 50, and, Your Honor, I beg to be excused from taking the stand.

THE COURT: Before you sit down, Mr. Griffith, you fully understand that you, as an attorney, are an officer of the Court?

MR. GRIFFITH: Yes, Your Honor.

THE COURT: And, regardless of that relationship, having been ordered and requested by the Court to take the stand, you refuse on the basis of the statement which you have just made?

MR. GRIFFITH: That is right; Your Honor. . ." (R. JIG, pp. 28-29)

Note that the Petitioner did not base his refusal to take the witness stand upon any right against self-incrimination guaranteed him by the Constitution of the United States or the Constitution of the State of Alabama.

The Court thereupon entered the following order:

"RE: IN THE MATTER OF JOHN IKE GRIFFITH, ATTORNEY AT LAW

2/10/65: The witness, John Ike Griffith, having been brought into Court by a writ of attachment and having been called as a witness by the Court and having declined and refused to take the stand as a witness for reasons indicated by said witness, the Court adjudges said witness in continuing contempt of Court for failure to take the stand and orders a confinement in the Jefferson County jail until such time as he is willing to conform to the order of the Court and take the stand as a witness. The Court suspends the confinement of said witness and recognizes him on his own bond or bail to permit a review of the order of the Court adjudging him in contempt of Court, providing that said review in whatever manner is proper and legal be promptly processed and for-

warded to the reviewing authorities. An exception is noted on behalf of the Commissioner, the Board of Commissioners, and the respondent, or witness, John Ike Griffith." (R. JIG, pp. 29-30)

On February 10, 1965, a similar hearing was held before the Honorable J. Edgar Bowron in the matter of the Petitioner, J. Robert Huie. This Petitioner also filed a Motion to Quash Attachment identical in content to that filed by the Petitioner, J. Ike Griffith. (R. JRH, pp. 10-12) In argument counsel for this Petitioner stated:

"MR. MURPHY: . . . we say that under Title 46, Section 43, in view of the nature of these charges in that they relate to a divorce case or cases in which it is claimed in the complaint that complainant nor respondent neither one were ever a bona fide resident of the State of Alabama, and that the two are tied so closely together that there is such a connection between lawyer and client in that the client could be prosecuted in connection with perjury . . . .

. . . this defendant is being denied the right of due process of law under Article One, Section Six of the Constitution of the State of Alabama, and under the Due Process Clause of the Constitution of the United States of America. . ." (R. JRH, p. 15)

The Court ordered this Petitioner to take the stand and he refused to do so, his reasons therefor being reflected in the following excerpt from the record:

"THE COURT: . . . All right, Mr. Murphy, the Court will overrule your objections, and I note an exception on behalf of you and your clients, and I now ask the witness to take the stand.

MR. MURPHY: Your Honor, the witness declines to take the stand on the same grounds as stated in Mr. Griffith's case.

THE COURT: All right. I will ask you, Mr. Huie, if you are aware that you, as an attorney licensed to practice law in the State of Alabama, are an officer of the Court?

MR. HUIE: Yes, sir; Your Honor, I realize that.

THE COURT: And your decision not to take the stand is made fully with the understanding that you are an officer of the Court?

MR. HUIE: Upon the advice of my attorney, and with all due respect to the Court, in view of the statement that Mr. Murphy has just made, I respectfully decline to take the stand . . ." (R. JRH, p. 16)

Note that this Petitioner did not base his refusal to take the witness stand upon any right against self-incrimination guaranteed him by the Constitution of the United States or the Constitution of the State of Alabama.

The Court thereupon made following statement:

"THE COURT: I won't give you all an order, but the order will be identical in each case: Under the circumstances, the witness declining to take the stand as a witness, having been ordered to do so by the Court, the Court will hold the witness, J. Robert Huie, in contempt, continuing contempt, and adjudicate that you are to be confined in the Jefferson County jail until such time as you are willing to conform to the order of the Court and take the stand as a witness. The court suspends the confinement of said witness and recognizes you on your own bond or bail to permit a review of the order of this Court adjudging you in contempt of Court, providing that said review in whatever manner is proper and legal be promptly processed and forwarded to the reviewing authorities. And we note an exception to this ruling, separately and severally, to you and your counsel of record,

and I, therefore, Mr. Huie, recognize you on your own bond and this case is continued until March 1, 1965, at 2:00 p.m., Room 306, courthouse." (R. JRH, p. 16)

ARGUMENT
QUESTION A

Where a witness has failed to claim any constitutional privilege against self-incrimination before the courts of a state will certiorari lie where he asserts such privilege for the first time in his Petition for Writ of Certiorari?

The most thorough and painstaking examination of the record will fail to reveal wherein the Petitioners in any manner apprised the Commissioner appointed to take their testimony or the Judge who held them in contempt for refusal to take the witness stand that their refusal to take the witness stand was based upon any claim of privilege against self-incrimination. Each Petitioner filed a Motion to Quash Attachment containing a general and indefinite reference to the due process clauses of the Constitution of the State of Alabama and the Constitution of the United States. However, this general statement is controlled and rendered definite by specific argument of counsel and by the specific statement made under oath by the Petitioner, **John Ike Griffith**, and adopted under oath by the Petitioner, **J. Robert Huie**, upon his refusal to comply with the court's order to take the witness stand. (R. JIG, pp. 28-29) In essence, the Petitioners refused to take the stand because of an alleged privilege and duty not to divulge confidential information imparted to them by their clients, referring to a specific Alabama statute on this point, and referring to another Alabama statute which makes the wilful violation of such duty a cause, not for criminal prosecution, but for disbarment.

The record is such that neither the Commissioner, nor Judge, could possibly have surmised that the Petitioners refused to take the witness stand because of a claim of privilege against self-incrimination.

The Opinion in Ex-parte Griffith, 178 So. 2d 169 (Ala. 1965) (Appendix A, pp. A1-A13) makes no mention whatsoever of the privilege against self-incrimination since no issue concerning the same was before the court. The Opinion in Ex-parte Huie, 178 So. 2d 156 (Ala. 1965) (Appendix A, pp. A14-A23) makes mention of a reference in Petitioners' Reply Brief before the Alabama Supreme Court to the privilege against self-incrimination as guaranteed by the Constitution of the State of Alabama. Having failed to invoke the privilege in the proceedings before the Commissioner and the Circuit Judge an issue concerning the same could not be injected for the first time on appeal. The Opinion concludes, however, that such privilege would not permit the Petitioner to refuse to take the stand, and that the court would not speculate concerning specific questions prior to the propounding of any questions.

In Quinn v. United States, 349 U. S. 155, this Court held that a witness, under the facts and circumstances of that case, had validly invoked the claim of privilege, stating that:

> ". . . . a claim of the privilege does not require any special combination of words."
>
> ". . . . the fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the committee of his intentions . . ."
>
> ". . . no ritualistic formula is necessary in order to invoke the privilege . . ." (emphasis added)

In a companion case, **Emspak v. United States, 349 U. S. 190**, the Court stated:

> ". . . . no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination."

The Petitioners did not express their intentions in vague terms. The Petitioners, attorneys at law and presumedly cognizant of their legal rights, upon refusing to comply with the court's order to take the witness stand, stated their specific grounds therefor, referring to three Alabama statutes completely unrelated to the subject of self-incrimination, and there was nothing in the record to give the Commissioner or Judge any hint that they relied upon this Constitutional right.

In **United States v. Monia, 317 U. S. 424**, the court held that no claim of privilege against self-incrimination was necessary on behalf of a witness appearing before a grand jury inquiring into an alleged violation of the Sherman Act in order to obtain immunity from prosecution. However, concerning the general requirement that the privilege must be validly claimed the Court stated:

> "The Fifth Amendment declares that 'No person . . . shall be compelled in any criminal case to be a witness against himself.' An investigation by a grand jury is a criminal case. The amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

In **United States v. Vajtauer, 273 U.S. 103**, the court affirmed the action of a district court in dismissing a writ

of habeas corpus issued to determine the validity of an order for deportation. An alien had been sworn, answered certain questions, and refused to answer other questions until the evidence upon which a warrant had issued was presented. On appeal he asserted that he had been denied the rights guaranteed him against self-incrimination. With regard to his failure to assert his claim, the court stated:

> ". . . It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, Mason v. United States, 244 U.S. 362, 61 L.ed. 1198, 37 Sup. Ct. Rep. 621, a determination which it cannot make if not advised of the contention. Cf. Re Edward Hess & Co. (D. C.) 136 Fed. 988; Ex parte Ervine (C. C.) 74 Fed. 954, 960. The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it."

The Petitioners refused to take the witness stand for certain clearly expressed reasons unrelated to any claimed privilege against self-incrimination, and they cannot be heard to belatedly assert such claim now.

QUESTION B

Does the privilege against self-incrimination of Amendment V, Constitution of the United States, as said Amendment is made applicable to the State of Alabama by Amendment XIV, Constitution of the United States, permit an attorney subject to disciplinary proceedings to refuse to take the stand and thus prevent the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would tend to incrimi-

nate him, or must such privilege be exercised in connection with specific questions propounded?

Admitting, arguendo, that the Petitioners had invoked a constitutional privilege against self-incrimination — a privilege which they did not rely upon — such privilege could, in no event, stifle all efforts of the counsel for the Alabama State Bar to question them.

The Petitioners were not under indictment by the State of Alabama for the commission of crime. The Petitioners, as attorneys, were charged with unethical conduct by the Grievance Committee of The Alabama State Bar for violation of certain Rules Governing the Conduct of Attorneys in Alabama, promulgated by the Board of Commissioners of The Alabama State Bar and approved by the Supreme Court of Alabama.

> "The privilege (against self-incrimination), except in the case of an accused in a criminal case, is merely an option of refusal, not a prohibition of inquiry." 8 Wigmore on Evidence, Section 2268 (McNaughton rev. 1961)

In United States v. Vajtauer, supra, involving a deportation proceeding having a criminal fact as its main issue, it was held that the deportee must take the stand and assert any claim of privilege as to specific questions.

Even the Petitioners do not claim that they occupy the position of defendants under indictment for crime. This is manifest by their freely submitting to the administration of the oath (an act which could not have been exacted from a defendant on trial for a crime), and then stating to the court, under oath, their reasons for refusing to submit to any interrogation.

The Supreme Court of Alabama has held that an action for disbarment of an attorney is not a criminal

proceeding. In Ex parte **Thompson**, 228 Ala. 113, 152 So. 229 (Ala. 1933) the court so stated in holding that an attorney was not entitled to a trial by jury in disbarment proceedings.

Although an issue involving the Petitioners' right against self-incrimination was not before the Supreme Court of Alabama -nor is such issue properly before this Court for that matter – the opinions in Ex parte **Griffith**, 178 So. 2d 169 (Ala. 1965) (JIG, Appendix, pp. A1-A13) and Ex parte **Huie**, 178 So. 2d 156 (Ala. 1965) (JRH, Appendix, pp. A14-A23) cite with approval and quote from Ex parte **Messer**, 228 Ala. 16, 152 So. 244 (Ala. 1933), which held that the provision of the Alabama Constitution providing that in all "criminal prosecutions" the accused has a right to be confronted by the witnesses against him did not preclude the use of depositions in a disbarment proceeding, the court stating:

> ". . . It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to quasi criminal proceedings; that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument . . ."

The courts of last resort in other states considering the question have uniformly followed this view, and have clearly enunciated the proposition that a disciplinary proceeding against an attorney is not a criminal prosecution as entitles the attorney to decline to testify. See: **Johnson** v. **State Bar of California**, 52 P.2d 928, 4 C.2d 744 (Cal. 1935); **Fish** v. **State Bar of California**, 4 P. 2d 937, 214 C. 215 (Cal. 1931); **Brophy** v. **Industrial Accident Commission**, 115 P. 2d. 835, 46 C.A. 2d 278 (Cal. App. 1941); **McIntosh** v. **State Bar of California**, 274 P. 1067, 211 Cal. 261 (Cal. 1931); **In re Vaughn**, 209 P. 353, 189

Cal. 491, (Cal. 1922); and In re Bailey, 248 P. 29, 30 Ariz. 407 (Ariz. 1926).

The Supreme Court of the United States has upon at least three occasions considered disciplinary proceedings against attorneys as non-criminal in nature.

The case of Randall v. Brigham, 74 U.S. 523, held that a judge was not liable in a civil action for the alleged wrongful disbarment of an attorney, the court expressly approving holdings of the Supreme Court of Massachusetts that certain safeguards afforded by the Massachusetts' Constitution to defendants indicted for crime were unavailable to attorneys in disciplinary proceedings, the opinion containing the following:

> "It has held that the proceeding taken for the removal of the plaintiff could not, in any just and proper sense, be deemed a criminal procedure, in which a party has a right to a full, formal and substantial description of the offense charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process, according to the signification of the words 'per legem terrae', as used in Magna Charta, or in the Declaration of Rights. Randall, Petitioner for Mandamus, 11 Allen, 473. This construction of the highest court of the State, not called in question by any conflicting decision of that court, is conclusive upon us. Prov. Institution v. Mass. 6 Wall. 630, 18 L.ed. 910"

In discharging a rule to show cause why a disbarment order of a United States District Judge should not be vacated, the court in Ex parte Wall, 107 U.S. 265, stated:

> "The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but

> for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them."

Finally, in **Cohen** v. **Hurley**, supra, there is no indication that the attorney was considered to occupy the position of a defendant in a criminal prosecution, and although **Malloy** v. **Hogan**, supra, holds that Amendment XIV, Constitution of the United States, makes Amendment V, Constitution of the United States, applicable to the State of Alabama, there is no hint or suggestion therein that this converts a civil disciplinary proceeding into a criminal prosecution and raises a barrier preventing the judicial department of a state acting through a duly authorized state bar from even questioning attorneys as officers of the courts concerning their fitness.

In the case of **Landy** v. **United States**, 283 F. 2d 303, the United States Court of Appeals, Fifth Circuit, held that a movant was not entitled to have quashed an administrative subpoena of the Internal Revenue Service on the grounds that it might result in questions which the subpoenaed witness could constitutionally refuse to answer. In the opinion, the court observed:

> ". . . The privilege of the Fifth Amendment must be exercised in connection with precise questions and not as a general excuse for refusing to appear in response to subpoena. Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L.Ed. 344)."

A careful review of the cases decided by the Supreme Court of the United States involving the Fifth Amendment as applied to witnesses other than defendants under indictment and on trial for crimes, reveals that in each and every case the party invoking the protection of the Fifth Amendment relied upon the right against self-incrimination as it applied to the answer to some specific question.

In no case was the Fifth Amendment considered a bar to the propounding of all questions.

In the case of **Mason** v. **U.S.**, 244 U.S. 362, the court affirmed the action of the District Court of the United States for the District of Alaska in holding a witness before a grand jury in contempt for his failure to answer specific questions. In the opinion, the court quoted with approval from the language of Chief Justice Marshall in the case involving the trial of Aaron Burr, **Re. Willie**, Fed. Cas. No. 14692e, wherein it was stated:

> "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law." (Emphasis added)

In the case of **Hoffman** v. **U.S.**, 341 U.S. 479, 95 L.Ed. 1118, 71 S. Ct. 814, the court sustained the claim of privilege of a witness called to testify in a grand jury investigation in his refusal to testify to a series of specific questions. In the opinion, the court stated:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces those which could furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (Patricia) Blau v. United States, 340 U. S. 159, ante, 170, 71 S. Ct. 223 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 244 U. S. 362, 365, 61 L.Ed. 1198, 1199, 37 S. Ct. 621 (1917), and the cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would in-

criminate himself — his say-so does not of itself establish the hazard of incrimination."

In the case of **Rogers v. United States, 340 U.S. 367**, the court held that a witness testifying before a grand jury was not justified in refusing to answer a specific question, primarily because after answering certain prior questions, it was considered that the specific question could not further incriminate her. In the opinion, the Court stated:

> "As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further incrimination."

In the case of **Brown v. Walker, 161 U.S. 591**, the court in commenting upon the obligation of a witness to testify in the absence of a valid claim against self-incrimination, stated:

> "The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

The Petitioners' claim of the privilege against self-incrimination is premature, and the decisions and opinions of the Supreme Court of the State of Alabama do not deprive the Petitioners of any federal constitutional rights.

The Petitioners rely exclusively upon **Malloy v. Hogan**, supra. The argument being that the state standards against

self-incrimination which were applied in **Cohen** v. **Hurley**, supra, are less stringent than the federal standards made applicable to the states by **Malloy** v. **Hogan**. However, there is nothing in **Malloy** v. **Hogan** to indicate that the application of such federal standards would permit an attorney in disciplinary proceedings to refuse to take the witness stand and assert a carte blanche authority to refuse to answer all questions that might be directed to him. **Malloy** v. **Hogan**, does not purport to overrule the holdings that a defendant in non-criminal proceedings cannot refuse to testify. Such a party cannot evade all interrogation even when a criminal fact constitutes the main issue. **United States** v. **Vajtauer**, supra.

Cohen v. **Hurley**, supra, involved a disbarment proceeding against an attorney wherein the attorney refused to answer specific questions. **Malloy** v. **Cohen**, supra, involved a state inquiry into gambling (for which the witness had pleaded guilty and been punished) wherein the witness refused to answer specific questions. Neither the attorney nor the witness refused to to take the witness stand.

Applying federal standards against self-incrimination to the facts of the instant case in no manner alters the result.

QUESTION C

Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, permit an accused attorney in disbarment proceedings to refuse to take the witness stand and thus prevent the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would relate to confidential communications between attorney and client, or must such privilege be exercised in connection with specific questions propounded?

Had the Petitioners validly claimed privilege against self-incrimination such claim of privilege would have been premature prior to the Petitioners' taking the witness stand. The Petitioners' assertion that Title 46, Section 43(4), Code of Alabama, 1940, raises a privilege as to all questions is equally premature.

The opinion in Ex parte Griffith, 178 So. 2d 169 (Ala. 1965) (JIG, Appendix, pp. A1-A13) correctly observes:

> "It is therefore manifest that the petitioner in refusing to take the stand and testify assumed for himself the right to determine whether his assertion of the doctrine of confidential communications was valid. This was a matter solely within the province of the court to determine. The petitioner's actions in the premises were premature and can furnish no justification for his refusal to testify."

The opinion in Ex parte Huie, 178 So. 2d 156 (Ala. 1965) (JRH, Appendix, pp. A14-A23) observes with equal clarity:

> "Petitioner has not taken the stand and no question has been propounded to him. To say now whether he will be privilege to refuse to answer any question would be sheer speculation. The possibility that a question might call for privileged evidence does not justify petitioner in refusing to take the stand."

Everything heretofore stated concerning the premature nature of any alleged claim of privilege against self-incrimination is of equal applicability with regard to the asserted claim of invasion of the attorney-client privilege.

There are many limitations upon the application of the rule concerning privileged communications, and these are discussed at length in the opinion in Ex parte Griffith, 178 So. 2d 169 (Ala. 1965) (JIG, Appendix, pp. A1-A13).

Numerous questions could well be propounded to the Petitioners which might fall within the exceptions stated. Certainly the due process and equal protection clauses of Amendment XIV, Constitution of the United States, do not preclude the counsel for a state bar association from requiring an attorney in disciplinary proceedings to take the witness stand, or enable the Petitioners by refusing to take the witness stand to preclude the possibility of such questions being propounded.

It is for the court to determine whether a communication between client and attorney is privileged. In People's Bank of Buffalo v. Brown, 112 F. 652 (C. C. A. 3) the court required an attorney to submit to interrogation stating:

> "... There is no presumption of privilege, and though its allowance may, in a clear case, be founded upon the voluntary statement of the attorney that his knowledge of the fact to which he is asked to testify was acquired in a professional confidence, yet, wherever, as in this case, the circumstances suggest that the sufficiency of the grounds of that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity . . ."

> "... The witness declines to answer, not after inquiry and adjudication by the court, but upon his own mere declaration that the matters to which his declination relates were privileged communications, and thus both of the facts and the law he constitutes himself the exclusive judge. The province of the court cannot be thus usurped. If it could be, it is obvious that the rule under consideration, which is designed to promote the administration of justice, might readily be misused for its obstruction, and become, in consequence, too pernicious to be tolerated. . ."

Communications made in connection with the perpetration of fraud upon the court are not privileged. In A. B. Dick Co. v. Marr, 957 F. Supp. 83, the court stated:

> ". . . it is quite clear that the privilege disappears if it is invoked merely to cloak a fraudulent scheme, and that when a client consults an attorney as to how to concoct or perpetrate a fraud the privilege is unavailing. . ."

The due process and equal protection clauses of Amendment XIV, Constitution of the United States, do not stand, as a bar to the Petitioners' taking the witness stand.

QUESTION D

Where an attorney subject to disciplinary proceedings by a state bar association fails to challenge before the courts of Alabama the constitutionality of the Rules Governing the Conduct of Attorneys pursuant to which proceedings were had against him, will certiorari lie where he attacks the constitutionality of such Rules for the first time in his Petition for Writ of Certiorari?

The Petition for Writ of Certiorari is fatally defective insofar as the Petitioners seek to challenge the validity of Rule 25, Section A of the Rules Governing the Conduct of Attorneys in Alabama. In view of the fact that the validity of this Rule was never challenged before the Supreme Court of Alabama, before the Circuit Court of the Tenth Judicial Circuit in and for Jefferson County, Alabama, or before the Commissioner appointed by the President of The Alabama State Bar to take the testimony of the Petitioners, the point cannot now be raised for the first time.

The Petitioners' references to the due process clause of Amendment XIV, Constitution of the United States, in paragraph 4, Motions to Quash Attachment (R. JIG, pp. 11-13; R. JRH, pp. 10-12) and argument of counsel in the matter of Petitioner J. Robert Huie, (R. JRH, p. 15) are clearly directed to an alleged denial of due process because of the respondent's attempt to require the Petitioner's to testify. The equal protection clause of Amendment XIV is never mentioned. The constitutional validity of Rule 25, Section A, has never been challenged until the filing of the Petition for Writ of Certiorari.

Matters neither considered nor ruled on below should not be initially adjudicated in these proceedings. New York Dock Co. v. The Pozman, 274 U. S. 117; Delaware, T. & W. Ry. v. Koske, 279 U. S. 7.

QUESTION E

Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, preclude disciplinary procedures against an attorney pursuant to Rules Governing the Conduct of Attorneys promulgated by a Board of Commissioners and approved by the Supreme Court of Alabama, which Rules prohibit an attorney from filing an action for divorce with knowledge or reasonable cause to believe that neither party is a bona fide resident of the State where the statutes and decisions construing said statutes require that one party to a divorce proceeding must be a bona fide resident of the state although the statute prescribes no specific period of time to establish residence?

Title 34, Section 29, Code of Alabama, 1940, contains the following provision:

"When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided, however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action."

True, the Supreme Court of Alabama in Levy v. Levy, 256 Ala. 629, 59 So. 2d 344, and Hillery v. Hillery, 275 Ala. 617, 157 So. 2d 217, held that no particular or specific period of residency is required in a divorce proceeding. However, one party must be a bona fide resident in order to confer jurisdiction.

There is no conflict between the above quoted Rule Governing the Conduct of Attorneys in Alabama and the above quoted statute and the decisions construing the same.

Courts have traditionally disciplined attorneys where such attorneys are guilty of perpetrating a fraud upon the court. Rule 25-A of the Rules Governing the Conduct of Attorneys in Alabama merely makes effective this well established practice.

CONCLUSION

For reasons stated herein, it is respectfully submitted the Petition for Writ of Certiorari in these cases should be denied.

Respectfully submitted,

M. Ronald Nachman, Jr.
1109-1125 First National Bank Building
Montgomery, Alabama 36104

Special Counsel for Respondent

William H. Morrow, Jr.
Alabama State Bar
Post Office Box 2106
Montgomery, Alabama 36103

Acting General Counsel